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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1713

SECRETARY OF THE NAVY, APPELLANT

v.

MARK AVRECH

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE APPELLANT

OPINIONS BELOW

The opinion of the court of appeals (J.S. App. A, pp. 13–16) is reported at 477 F. 2d 1237. Neither the written nor the oral opinion of the district court (J.S. App. C, pp. 29–34, J.S. App. B, pp. 27–28) is reported.

JURISDICTION

Appellee brought this civil action in the United States District Court for the District of Columbia under 5 U.S.C. 701–706, 28 U.S.C. 1331 and 1361, and D.C. Code (1961 ed., Supp. V) 11–521, challenging his court-martial conviction for attempting to violate Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934. The district court dismissed the

suit, but on March 20, 1973, the United States Court of Appeals for the District of Columbia Circuit entered a judgment of reversal (J.S. App. D, p. 35), holding that Article 134 is unconstitutionally vague. A notice of appeal to this Court (J. S. App. E, p. 36) was filed with the court of appeals on April 19, 1973. Probable jurisdiction was noted on October 9, 1973.

This Court has jurisdiction under 28 U.S.C. 1252, since the court of appeals, in a civil action to which an officer of the United States is a party, held an Act of Congress unconstitutional. See Stern and Gressman, *Supreme Court Practice* § 2.5 (4th ed.).

STATUTE INVOLVED

Article 134 of the Uniform Code of Military Justice (10 U.S.C. 934) provides:

> Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

QUESTIONS PRESENTED

1. Whether Article 134 of the Uniform Code of Military Justice, 10 U.S.C. 934, is unconstitutional as applied.

2. Whether Article 134 is unconstitutional on its face.

STATEMENT

1. On June 24, 1969, appellee Avrech, then a United States Marine serving on active duty in Vietnam, was tried by a special court-martial on charges of having violated Article 80 and Article 134 of the Uniform Code of Military Justice ("UCMJ"), 10 U.S.C. 880, 934. Article 80 provides for punishment of attempts to commit offenses otherwise punishable under the UCMJ; Article 134—the General Article—penalizes, *inter alia*, "all disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces."[1] Although he was acquitted on the specification filed under the General Article itself, Avrech was convicted on the specification drawn under Article 80, charging an attempt to commit the offense charged under the General Article.[2] This specification alleged that Avrech had attempted to publish to members of the Armed Forces, "with design to promote disloyalty and disaffection among the troops,"[3] a statement disloyal to the United States.

The events leading to the conviction took place at Marble Mountain Air Facility, at Danang, in Vietnam, while Avrech was on active duty in the combat zone. After enlisting in the Marines in August 1967, Avrech

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[1] A third clause, referring to "crimes and offenses not capital," is not at issue in this case.

[2] The charges and specifications under Article 80 and Article 134 are reprinted in full in the Appendix, pp. 3–5.

[3] The requirement of specific intent in this charge was modeled on the standard forms contained in the *Manual for Courts-Martial, United States*, 1968 (Appendix 6-*Forms for Charges and Specifications*). The latest edition of the Manual is the Revised Edition, 1969.

arrived in Vietnam as a private first class in Februar 1969. While on night duty with the group suppl offices at his base, he typed a stencil of a statemer (Tr. 32a)[4] which was entitled "The Truth" an marked "Volume I Number I." It stated:

> I've been in this country now for 40 days an I still don't know why I'm here. I've heard a the arguments about communist aggression an helping the poor defenseless people. I've als heard this three years ago. The entire Vie namese Army will switch to a pacification rol in 1967 and leave major fighting to the Ameri can troops. (Statement of South Vietnames Foreign Minister, L.A. Times, Nov. 18, 1966. It seems to me that the South Vietnam peopl could do a little for the defense of their coun try. Why should we go out and fight their bat tles while they sit home and complain abou communist aggression. What are we cannor fodder or human beings? If South Vietnam wa willing to go it on their own back in 1964 wha the hell is the matter with them now? Th United States has no business over here. Thi is a conflict between two different politicall minded groups. Not a direct attack on th United States. It's not worth killing America boys to have Vietnam have free elections. (For mer Vice President Richard M. Nixon, L.A Times, December 31, 1967.) That was our pres ent leader of this country and now he has th chance to do something about the situation and what happens. We have peace talks with North Vietnam and the V.C. That's just fine and

[4] "Tr." refers to the Summarized Record of Trial (Proper) reprinted in the appendix to the briefs in the court of appeals

> dandy except how many men died in Vietnam the week they argued over the shape of the table? Why does this country think that it can play games with peoples lives and use them to fight their foolish wars. I say foolish because how can you possibly win anything like a war by destroying human lives. Human lives that have no relation at all to the cause of the conflict. Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial? We must strive for peace and if not peace then a complete U.S. withdrawal. We've been sitting ducks for too long. * * * SAM[5]

On April 15, 1969, Avrech asked Corporal William R. Jackson, who was operating the mimeograph machine in the office, to make copies of the statement or allow him to operate the machine (Tr. 25a). When Jackson inquired about the contents of the stencil, Avrech replied, "[I]f I tell you that you won't let me run it off" (Tr. 25a). Jackson refused to mimeograph any copies. Later he noticed that Avrech had remained in the office and had printed "The Truth" as a title at the top of the stencil (Tr. 25a–28a). When Jackson approached him, Avrech handed him the stencil and invited him to read it (Tr. 28a). After reading the statement, Jackson reproached him and subsequently turned the statement over to a superior officer (Tr. 26a).

Avrech testified that he had prepared his stencil to record his thoughts and circulate a written statement

[5] See J.S. App. A, pp. 15, 16.

for discussion (Tr. 33a). According to Avrech, this tract was intended as the first of a series, to be supplemented when he formulated additional thoughts on the subject (Tr. 35a). Avrech denied that "The Truth" was disloyal to the United States (Tr. 39a). A witness for the government, however, testified that Avrech had stated earlier that it was disloyal (Tr. 52a). Avrech testified that at the time he tried to run off the stencil he believed that a court-martial was unlikely (Tr. 36a), but the statement itself contained Avrech's acknowledgement that his actions might lead to a court-martial (Tr. 36a).

Upon conviction, Avrech was sentenced to reduction in rank to the lowest enlisted grade, forfeiture of three months' pay and confinement at hard labor for one month. The commanding officer suspended the confinement, but the remainder of the sentence was sustained by the Staff Judge Advocate and the Judge Advocate General of the Navy.*

2. On December 16, 1970, Avrech sought relief in the United States District Court for the District of Columbia. Avrech alleged that the General Article on its face and as applied was unconstitutionally vague and overbroad. In addition he contended that his anti-war statement was protected by the First Amendment, and that he had been denied due process

* On June 26, 1970, Avrech was given a bad conduct discharge from the United States Marine Corps after a second and unrelated special court-martial conviction on August 18, 1969, for having stolen a camera from a Marine Corps Exchange, in violation of Article 121 of the UCMJ, 10 U.S.C. 921.

of law because he was convicted without sufficient evidence of criminal intent.

Avrech sought an order requiring the Secretary of the Navy to expunge any record of his conviction and to restore all pay and benefits lost because of the conviction. In granting the Secretary's motion for summary judgment, the district court held that Avrech's statement was not protected by the First Amendment and that the General Article was not unconstitutionally vague (J.S. App. B, pp. 27–28; J.S. App. C, pp. 29-34).

The court of appeals, in an opinion by Mr. Justice Clark, reversed on the ground that the General Article violates due process since the relevant portions of that statute give "no fair warning of the conduct it proscribes and fails to provide any ascertainable standard of guilt to circumscribe the discretion of the enforcing authorities" (J.S. App. A, p. 20). The court of appeals did not decide the First Amendment issue or whether Avrech's conduct violated Article 134.

SUMMARY OF ARGUMENT

I

The court below held that Article 134 was void-for-vagueness on its face. While we disagree with that holding (*infra,* III), our first submission is that the court below acted improperly in judging the statute on its face. We believe that the court should have evaluated the Article in its application to this particular case. If Avrech had "fair warning" that his conduct was proscribed by the Article, the Article should have been sustained as applied. While this

Court has on occasion invalidated statutes on their face, without regard to their application to a particular case, where they directly impinge upon First Amendment interests, we submit, for several reasons, that this approach should not be applied to the military Articles.

In the first place the military is a specialized society with a history, tradition and disciplinary needs unfamiliar to civilian society and civilian courts. To promote and enforce discipline essential to its effectiveness, the military has had a General Article, similar to Article 134, since the founding of the Republic. Long ago this Court recognized that the "apparent indeterminateness" of the Article to civilian courts did not exist in the services, where its meaning was "well known by practical men in the navy and army." *Dynes* v. *Hoover,* 20 How. 65. Moreover, the recognized necessary restrictions on freedom of speech in the armed services (See Emerson, *Toward a General Theory of the First Amendment,* 72 Yale L.J. 877, 935 (1963)) suggest that civilian courts should not strike down military laws on their face because of an alleged "chilling effect" on First Amendment rights. Finally, facial invalidation is inappropriate where a statute, like Article 134, forbids primarily nonexpressive conduct and has only marginal application to speech. *Broadrick* v. *Oklahoma,* No. 71–1639, decided June 25, 1973.

II

Article 134 is not unduly vague as applied to Avrech's conduct. Avrech was charged with attempting to publish a statement disloyal to the United

States, "with design to promote disloyalty and disaffection among the troops." The statement at least implicitly urged members of the armed forces not to participate in the United States' military efforts in Vietnam. At the time Avrech was a marine of two years standing, on active duty in a combat zone. Any one in his position would have known that conduct such as his was patently "to the prejudice of good order and discipline in the armed forces." Moreover, the *Manual for Courts-Martial,* a definitive official publication promulgated by the President, specifically warns that conduct such as that of Avrech would violate Article 134.

III

We finally submit that, should Article 134 be judged on its face rather than as applied, the Article is neither unduly vague nor overly broad. While the language of Article 134 is general, the military gives specificity to the Article in a number of ways. In the first place military court decisions have limited the Article to conduct that is "directly and palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." *United States* v. *Sadinsky,* 14 U.S.C.M.A. 563, 565. Moreover, the *Manual for Courts-Martial* contains lengthy discussions and illustrations of violations of the Article (See Apps. A, B, and C, *infra*). This articulation of the meaning of the general language in Article 134 is sufficient to overcome any vagueness challenge. Cf. *United States Civil Service Commission* v. *National Association of Letter Carriers,* AFL–CIO, No. 72–634, decided June 25, 1973.

Finally, Article 134 is not overly broad. Arti
134 is not in terms directed at speech at all; it p
hibits any actions that prejudice good military or
and discipline. The principal speech-related activit
which the Article covers are those forbidden by t
"disloyal statement" specification. That specificati
(*infra*, pp. 35–36), requires that a statement be ma
with the intention of promoting disloyalty and dis
fection among the troops, that the statement itself
disloyal to the United States and that the cond
"directly and palpably" prejudice good military or
and discipline. The *Manual* further illustrates the p
hibition, listing as three examples of disloyal utt
ances: "praising the enemy, attacking the war ai
of the United States, or denouncing our form of g
ernment" (¶ 213f (5)). These elements are fu
ther specified by military court decisions limiting t
disloyal statement specification to (1) public utt
ances which (2) actively call for opposition to t
military policy of the United States. Given the nec
sary limitations on freedom of speech in the milita
to the extent that Article 134 forbids disloyal sta
ments which undermine good military order and dis
pline, it does not offend the First Amendment.

ARGUMENT

I. THE COURT OF APPEALS IMPROPERLY DETERMINED TH CONSTITUTIONALITY OF ARTICLE 134 ON ITS FACE; SHOULD HAVE DETERMINED WHETHER THE ARTICLE UNCONSTITUTIONAL AS APPLIED

The court of appeals held that on its face Artic
134 is unconstitutional because it is unduly vagu

It did not rule that Avrech was punished for doing something which he could not reasonably have known constituted conduct "to the prejudice of good order and discipline in the armed forces"—the standard in Article 134—or that Avrech's activity did not constitute such conduct. Instead, without considering either of those issues, the court invalidated the entire provision because it concluded that Article 134 does not generally give "fair warning of the conduct it proscribes" and provides no "ascertainable standard of guilt."

We submit that the court of appeals took the wrong approach in evaluating the constitutionality of Article 134. Instead of considering the validity of the provision as an abstract matter on the basis of hypothetical applications of the Article, it should have tested its application in this particular case. If, as we believe and argue below, Avrech was, or should have been, aware that his attempt to distribute within the combat zone his attack on American military activities in Vietnam was a kind of action that Article 134 clearly prohibits, that should have been the end of the matter. There was no occasion for the court of appeals to strike down Avrech's conviction because of its conclusion that in other situations or applications it might not give adequate notice to those charged with its violation. Similarly, if the provision is constitutional as applied to Avrech, there is no reason to invalidate it for overbreadth on the basis of problems that might arise in its possible application in other situations not before the court.

This Court on occasion has struck down on the face and without regard to their validity, as applied the particular case, statutes whose prohibitions d rectly impinge upon or significantly implicate Fir Amendment rights (see pp. 18–19, *infra*). The theo of those decisions was that the mere existence of th statute itself had a chilling effect upon the exerci of the constitutionally protected rights, and that fu protection of those rights therefore required that th statute be invalidated without regard to whether had any impermissible impact upon the individu against whom it had been applied in the particula case. That rationale, however, is not appropriate i determining the constitutionality of the Articles whic govern the conduct of members of the armed force Although the guarantees of the First Amendmen apply to the military, the different character of th military community requires a different approach i determining how the First Amendment guarantees ar to be applied in that segment of society. To develo this analysis, it is necessary first to describe the spe cial character of the military community and the rule and customs that govern the conduct of its member

A. THE MILITARY COMMUNITY IS A SPECIALIZED SOCIETY GOVERN BY SPECIALIZED RULES AND CUSTOMS WHICH ARE WELL KNOW TO AND CONTROL THE CONDUCT OF ITS MEMBERS

The military is a specialized society with a history tradition and function wholly different from civilia society. The central mission of the military is "to figh or be ready to fight wars * * *" *Toth* v. *Quarles*, 35 U.S. 11, 17. "An army is not a deliberative body. It i the executive arm. Its law is that of obedience. N

question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.' *In re Grimley,* 137 U.S. 147, 153. More recently, this Court pointed out that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian" (*Orloff* v. *Willoughby,* 345 U.S. 83, 94), and that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty * * *" (*Burns* v. *Wilson,* 346 U.S. 137, 140).

In order properly to perform its special mission and to promote and enforce the discipline essential to its effectiveness, the military historically developed and enforced usages and customs which "may not unfitly be called the customary military law." *Martin* v. *Mott,* 12 Wheat. 35; Winthrop, *Military Law and Precedents* (2d ed., 1920), p. 41. Violations of these usages and customs were punishable by courts-martial. Thus, the Articles of the Earl of Essex (1642) provided that "[a]ll other faults, disorders and offences, not mentioned in these Articles, shall be punished according to the general customs and laws of war" (Winthrop, *supra,* p. 720). The British Articles of War of 1765—using the language now in the General Article—made punishable "all Disorders or Neglects * * * to the Prejudice of good Order and Military Discipline * * *" that were not mentioned in other articles.[7] In 1775 the Continental Congress adopted the British provision for the Army and reenacted it

[7] Winthrop, *Military Law and Precedents* (2d ed., 1920), p. 946.

in 1776. Except for the revision of 1916, which adde the clause punishing "all conduct of a nature to brin discredit upon the military service," substantially th same language has been preserved in the numerou Congressional reenactments of the Articles of War

The customs of the military were explicitly recog nized by Congress in the Navy's disciplinary code o 1799, which provided for punishment according t "the custom and usage of the sea service." [9] The 186 Revision of the Articles for the Government of th Navy, approved by President Lincoln, provided tha "[a]ll offences committed by persons belonging to th navy which are not specified in the foregoing article shall, be punished as a court-martial shall direct." [10] Although the Uniform Code of Military Justice adopted in 1951, used language more like that in th Army's Articles of War, it made no substantive change in the Navy's standards.[11]

Civilian courts have long recognized the special na ture of the military environment and its particular

[9] The legislative history of the General Article is described in Wiener, *Are the General Military Articles Unconstitutionally Vague?* 54 A.B.A.J. 357 (1968). The opinion below refers to this commentary as an example of the position of the "'old soldiers' themselves" that Article 134 is unduly indefinite when judged by the void-for-vagueness cases (J.S. App. A, p. 21). Mr. Wiener, however, concludes that the Article is not vague by modern standards, since its meaning is well-settled and understood within the military environment.

[9] Act of March 2, 1799, 1 Stat. 709, 717.

[10] Act of July 17, 1862, ch. 204, 12 Stat. 600, 603.

[11] S. Rep. No. 486, 81st Cong., 1st Sess.; Wiener, *supra*, 54 A.B.A.J. at 358; see, also, Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hastings L.J. 259, 260–261 (1971).

need for discipline and obedience, and that the seemingly imprecise standards of the general articles gain meaning from the customs of the service and provide adequate standards of conduct to those in the military. More than a century ago this Court, in *Dynes* v. *Hoover,* 20 How. 65, 79, upheld the Navy's General Article against an attack similar to that here. The Court recognized the importance of discipline and morale in the armed forces and held that a provision of "apparent indeterminateness" to a civilian court gained meaning and concreteness from the practical understanding of men trained in the customs of the service. It rejected the argument that the court-martial had no jurisdiction over a seaman's attempt to desert and ruled that the offense was covered by the 32d Naval Article, which provided that "[a]ll crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea." The Court reasoned (20 How. at 82):

> [W]hen offences and crimes are not given in terms or by definition, the want of it may be supplied by a comprehensive enactment, such as the 32d article of the rules for the government of the navy, which means that courts martial have jurisdiction of such crimes as are not specified, but which have been recognised to be crimes and offences by the usages in the navys of all nations, and that they shall be punished according to the laws and customs of the sea. Notwithstanding the apparent indeterminateness of such a provision, it is not liable to abuse; for what those crimes are, and how

> they are to be punished, is well known by practical men in the navy and army, and by those who have studied the law of courts martial, and the offences of which the different courts martial have cognizance.

This Court again recognized the proper role of "unwritten military law and usage" to give content to the General Article in *Swaim* v. *United States,* 165 U.S. 553. In *Swaim,* the Judge Avocate General of the Army had himself been convicted of conduct to the prejudice of good order and military discipline, but argued that no offense under that Article was shown by the facts of his case. This Court rejected the argument (165 U.S. at 561–562):

> If this position were well taken it would throw upon the civil courts the duty of considering all the evidence adduced before the courts-martial and of determining whether the accused was guilty of conduct to the prejudice of good order and military discipline in violation of the articles of war.
>
> But, as the authorities heretofore cited show, this is the very matter that falls within the province of courts-martial, and in respect to which their conclusions cannot be controlled or reviewed by the civil courts. As was said in *Smith* v. *Whitney,* 116 U.S. 178, of questions not depending upon the construction of the statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law. * * *

This Court's opinion in *Swaim* largely followed Judge Nott's opinion for the Court of Claims in that case, 28 Ct. Cl. 173. After discussing the Article punishing conduct unbecoming an officer and a gentleman, Judge Nott observed (28 Ct. Cl. at 228) that cases involving "conduct to the prejudice of good order and military discipline are still further beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor [as is conduct unbecoming an officer], but must be gauged by an actual knowledge and experience of military life, its usages and duties." See, similarly, *Smith* v. *Whitney,* 116 U.S. 167, 178–179, 183–184; *United States* v. *Fletcher,* 148 U.S. 84, 91–92; *Carter* v. *McClaughry,* 183 U.S. 365, 386–387, 390, 400–401. Cf. *Ex parte Quirin,* 317 U.S. 1, 29–31, 35.

These provisions and decisions have recognized, since the founding of the Republic, that because of the special situation of the military—its need to maintain discipline and order, and the particular customs reflected in traditional military conduct which the civilian courts cannot fully comprehend or properly evaluate—the military is governed by different standards than civilian society; and that it is unwise and dangerous for the civilian courts to attempt to evaluate military discipline on the basis of the standards by which civilian crime is determined. As former Chief Justice Warren stated, after noting that historically the civilian courts have maintained a "hands off" attitude toward the military (Warren, *The Bill*

of Rights and the Military, 37 N.Y.U. L.J. 181, 187 (1962)):

> [I]t is indisputable that the tradition of our country, from the time of the Revolution until now, has supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have. Many of the problems of the military society are, in a sense, alien to the problems with which the judiciary is trained to deal.

B. THE FACT THAT CERTAIN APPLICATIONS OF ARTICLE 134 MAY INVOLVE SPEECH THAT IS PROTECTED BY THE FIRST AMENDMENT DOES NOT REQUIRE THAT THE CONSTITUTIONALITY OF THE ARTICLE BE DETERMINED ON ITS FACE

The traditional rule of constitutional adjudication is that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick* v. *Oklahoma,* No. 71–1639, decided June 25, 1973, slip op. 9. This rule has been altered in the First Amendment context, however, to permit "attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute with the requisite narrow specificity." *Dombrowski* v. *Pfister,* 380 U.S. 479, 486. See, also, *N.A.A.C.P.* v. *Button,* 371 U.S. 415, 432–433; *Coates* v. *City of Cincinnati,* 402 U.S. 611; *Keyishian* v. *Board of Regents,* 385 U.S. 589. The reason for this

relaxed rule of standing is the possible "chilling effect" such statutes might have on the exercise of First Amendment rights. Permitting individuals to challenge the facial validity of the statute, irrespective of its application to their particular activity, is a means of lessening the prospect that persons whose activity is constitutionally protected will be deterred from exercising their rights by fear of criminal sanctions. See *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98.

This principle, however, should not be applied in considering constitutional challenges to the Uniform Code of Military Justice, which governs the conduct of military personnel. Unlike civilian society, where the individual is largely left alone by the State and is required only to avoid transgressing well-defined prohibitions, members of the armed forces are required affirmatively to meet certain standards of conduct established largely by tradition and developed in the light of the particular character and requirements of the military establishment. "In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code" (*Fletcher* v. *United States*, 26 Ct. Cl. 541, 563).

Although, as the Court of Military Appeals has recently pointed out, "servicemen, like civilians, are entitled to the constitutional right of free speech" (*United States* v. *Priest*, 21 U.S.C.M.A. 564, 570), that right necessarily is more limited for servicemen than for civilians. As Professor Emerson has stated (Emerson, *Toward a General Theory of the First Amend-*

ment, 72 Yale L.J. 877, 935 (1963)): "To a certain extent, at least, the military sector of a society must function outside the realm of democratic principles, including the principle of freedom of expression." The Court of Military Appeals has explained the reasons for these necessary limitations on freedom of speech (*United States* v. *Priest, supra*, 21 U.S.C. M.A. at 570):

> In the armed forces some restrictions exist for reasons that have no counterpart in the civilian community. Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities unless it both is directed to inciting imminent lawless action and is likely to produce such action. *Brandenburg* v. *Ohio, supra* [395 U.S. 444]. In military life, however, other considerations must be weighed. The armed forces depend on a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected. *United States* v. *Gray, supra* [20 U.S.C.M.A. 63].

See, also, *Dash* v. *Commanding General*, 307 F. Supp. 849, affirmed *per curiam*, 429 F. 2d 427 (C.A. 4).

It follows, we believe, that as long as Article 134 put Avrech on notice that it prohibited his activity—and, as we show below, it did—there is no occasion for the civilian courts to strike it down because of its

alleged chilling effect upon the possible exercise of First Amendment rights of other servicemen in other situations. Article 134 performs a vital role in the maintenance of military discipline and order and insuring proper military conduct. It could not continue adequately to perform that office if its validity were tested not on the basis of its application to particular cases, but in relation to every hypothetical situation that could be imagined.

It is a settled principle of constitutional adjudication that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language" (*United States* v. *National Dairy Corp.*, 372 U.S. 29, 32). This principle is of special importance in considering statutes governing military conduct. It counsels that the civilian courts should not strike down the long-established and traditional General Article because of uncertainty of the validity of its possible application to hypothetical and conjectural situations not involved in the actual case before the court.

This Court, moreover, has been reluctant to declare a statute void on its face when there exists a substantial class of situations to which the statute may be validly applied. See, *e.g.*, *United States* v. *Petrillo*, 332 U.S. 1, 17; *United States* v. *Wurzbach*, 280 U.S. 396, 399. Even if a statute may be defective in its marginal applications, facial invalidation is inappropriate if the "remainder of the statute * * * covers a whole range of easily identifiable and constitution-

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ally proscribable * * * conduct." *United States Civil Service Commission* v. *National Association of Letter Carriers, supra,* slip op. at 31. In *Broadrick* v. *Oklahoma, supra,* the Court summarized some related principles (slip op. at 13–14):

> [T]he plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" towards conduct and that conduct—even if expressive—falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect—at best a prediction—cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe. Cf. *Alderman* v. *United States,* 394 U.S. 165, 174–175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep. * * *

As we show below, whatever problems there may be in applying Article 134 to peripheral situations, there is "a whole range of easily identifiable and constitution-

ally proscribable * * * conduct" (*Letter Carriers, supra*) that it covers.

Moreover, facial invalidation has been principally applied to statutes which seek to regulate "only spoken words." *Gooding* v. *Wilson,* 405 U.S. 518, 520. See *Cohen* v. *California,* 403 U.S. 15; *Street* v. *New York,* 394 U.S. 576; *Brandenburg* v. *Ohio,* 395 U.S. 444; *Chaplinsky* v. *New Hampshire,* 315 U.S. 568. Article 134 is not so limited, but broadly covers a wide variety of conduct, of which only a small part involves speech. The *Manual for Courts-Martial,* discussed in detail below, pp. 28–30, describes and specifies the elements of more than 70 different offenses which Article 134 covers; only five of those involve speech or writing.[12]

As we now show, Article 134 is not unconstitutionally vague as applied to respondent Avrech's conduct.

II. ARTICLE 134 IS NOT UNCONSTITUTIONAL AS APPLIED TO THE CONDUCT INVOLVED IN THIS CASE

The test for determining whether a statute is impermissibly vague is whether it "conveys sufficiently

[12] In addition to the offense charged in this case—the publication with the intent to promote disloyalty and disaffection among the troops, of a statement disloyal to the United States—the four other offenses are: (1) criminal libel, defined as circulating a written defamatory statement concerning another serviceman "willfully, maliciously, and without justifiable cause" (App. 6c); (2) indecent, insulting or obscene language communicated to a female over sixteen years of age or to a child under sixteen; (3) the wrongful and knowing depositing of obscene, lewd and lascivious matter in the mails; and (4) the wrongful and unjustified communication of a threat, defined as the expression of "an avowed present determination or intent to injure the person, property, or reputation of another * * *" (¶ 213f).

definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan* v. *DeGeorge,* 341 U.S. 223, 231–232. The question is whether well-defined standards have been "developed and accepted in actual practice" to give sufficient notice to those subject to the statutory prohibition that the conduct involved is prohibited. *Small Company* v. *American Sugar Refining Company,* 267 U.S. 233, 241; see *Hygrade Provision Co.* v. *Sherman,* 266 U.S. 497, 502; *Boyce Motor Lines* v. *United States,* 342 U.S. 337, 340–341; *United States* v. *Petrillo,* 332 U.S. 1, 8. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed" (*United States* v. *National Dairy Corp., supra,* 372 U.S. at 32–33).

The "common understanding and practices" (*Jordan, supra*) by which Article 134 is to be judged are, of course, those of the military. When the Article is examined "* * * not in vacuo, but in the context in which the years have placed it" (*United States* v. *Frantz,* 2 U.S.C.M.A. 161, 163), the conclusion is inescapable that it gave Avrech adequate notice that it prohibited the conduct in which he engaged.

Avrech was charged with attempting to publish to members of the armed forces "with design to promote disloyalty and disaffection amcng the troops" a statement disloyal to the United States. The statement at least implicitly urged members of the armed forces, to whom Avrech intended to distribute it, not to participate in military activities in Vietnam. It asked "Why should we go out and fight their battles while

they sit home and complain about communist aggression," stated that "It's not worth killing American boys to have Vietnam have free elections," and toward the end raised these questions: "Do we dare express our feelings and opinions with the threat of court-martial perpetually hanging over our heads? Are your opinions worth risking a court-martial?"

When the corporal whom Avrech requested to reproduce the stencil on the office mimeograph machine or allow him to do so asked Avrech about its contents, Avrech replied, "If I tell you that you won't let me run it off" (Tr. 25a).

At the time Avrech was a marine who had enlisted, who had been in the Service for almost two years, and who was in a combat area where he had been for four months. Someone in his position could hardly claim that he was not aware that his attempted distribution to members of the armed forces of a statement so sharply critical of American military operations in Vietnam, with its implied suggestion that his fellow soldiers should not participate therein, was conduct "to the prejudice of good order and discipline in the armed forces." Indeed, Avrech's statement itself reflects his own awareness that its publication posed the threat of court-martial, since it questioned whether other members of the armed forces were willing to run that risk in order to express their "opinions."

Avrech's knowledge that his action created the possibility of court-martial—which necessarily showed that he knew that Article 134 condemned that conduct—was hardly surprising. For, unlike civilians who are presumed to know the law, members of the armed

forces are specifically instructed concerning the Uniform Code of Military Justice and have its provisions explained to them. Article 137 of the Code requires that its provisions be "carefully explained to each enlisted member at the time of his entrance on active duty, or within sixty days thereafter" and be "explained again after he has completed six months of active duty * * *." Article 137 explicitly requires that each of the so-called punitive Articles—those defining particular offenses that are subject to punishment by court-martial, which includes Article 134—be explained to all enlisted personnel. During the almost two years that Avrech was in the marines, Article 134 thus was explained to him at least twice. Indeed, since the making of disloyal statements to the troops with the intention of promoting disloyalty and disaffection among them obviously is a serious breach of military responsibility, which is specifically dealt with in the specifications defining the proper method of charging various offenses under the Uniform Code (see, *infra*, pp. 35–38), it is not unlikely that at some point during Avrech's military service, the specific applicability of Article 134 to such conduct was discussed.

The *Manual for Courts-Martial*, a definitive official publication promulgated by the President, which describes in detail the substantive meaning of the various provisions of the Uniform Code of Military Justice (see *infra*, pp. 28–30), also makes clear the applicability of Section 134 to Avrech's conduct. The section in the *Manual* outlining types of conduct violative of Article 134 includes a discussion of "disloyal statement undermining discipline and loyalty" (¶ 213f

(5)). As examples of such misconduct, the *Manual* mentions "utterances designed to promote disloyalty or disaffection among the troops, as praising the enemy" or "attacking the war aims of the United States * * *." The same conduct is listed as violative of Article 134 in the Table of Maximum Punishments (¶ 127c) and in the forms for Charges and Specifications (App. 6c). If Avrech had any uncertainty whether his conduct would violate Article 134, reference to the *Manual* would have quickly dispelled it.

III. ARTICLE 134 IS NOT UNCONSTITUTIONAL ON ITS FACE

If, contrary to our submission, the Court should conclude that the constitutionality of Article 134 should be determined on its face rather than as applied, then we submit that the statute is neither unduly vague nor overly broad.

A. ARTICLE 134 IS NOT UNDULY VAGUE

As explained above (pp. 13–17), the generalized language of Article 134 gains meaning from and embodies the well-settled customs and practices of the military community. To members of that community, it sufficiently specifies what conduct it prohibits to satisfy the constitutional requirement that criminal statutes not be unduly vague.

The military courts themselves have recognized that Article 134 cannot be applied so broadly as to turn it into a "catchall" making "every irregular, mischievous, or improper act a court-martial offense." *United States* v. *Sadinsky*, 14 U.S.C.M.A. 563, 565. Rather, its reach has been limited to conduct that is "directly and

palpably—as distinguished from indirectly and remotely—prejudicial to good order and discipline." *United States* v. *Sadinsky, supra,* at 565; *United States* v. *Holiday,* 4 U.S.C.M.A. 454, 456. The *Manual for Courts-Martial, United States,* 1969 (Revised ed.), contains a similar admonition (¶ 213b):

> Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, the article does not contemplate these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.[12]

Moreover, there are many decisions by federal military and civilian courts determining whether particular conduct falls within Article 134, and that body of case law provides further definition to the statute's necessarily general language. See, Gaynor, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article,* 22 Hastings L.J. 259 (1971).

Another important method by which the General Article gains specificity is the analysis and treatment of it in the *Manual for Courts-Martial.* The *Manual*—which is promulgated by the President by Executive Order—is a volume of several hundred pages which discusses in detail all aspects of the court-martial system. It covers such topics as the jurisdiction of courts-martial, the preparation of charges, the general procedural rules governing courts-martial, pleas and

[12] See, also, the 1951 *Manual,* ¶ 213a; *Manual for Courts-Martial, U.S. Army,* ¶ 183a (1949); *Manual for Courts-Martial, U.S. Army,* ¶ 152a (1928).

motions, the conduct of the trial, the rules of evidence to be there applied, and appellate review. The *Manual* contains a detailed discussion, covering 77 pages, of the substantive content and essential elements of the various so-called punitive articles of the Uniform Code, *i.e.*, those articles which proscribe particular offenses.

The discussion of Article 134 covers 10 pages (¶ 213) and it explains 14 categories of offenses which are commonly tried under that Article, including the offense of which Avrech was convicted, "disloyal statement undermining discipline and loyalty" (¶ 213f(5)). A more detailed list of offenses commonly charged under Article 134 is set forth in Appendix 6c of the *Manual*, which specifies the elements of each offense by giving model "specifications" to be used in court-martial charges. This appendix contains 63 different specifications for various offenses that may be charged under Article 134. They include, in addition to the disloyal statements specification involved in this case, such varying offenses as assaults, bribery, making and uttering worthless checks, drinking liquor with a prisoner, false swearing, firearms offenses, gambling with subordinates, offenses relating to the mails, obstructing justice, committing or suborning perjury, offenses by or against a sentinel, appearing in improper uniform, and wearing unauthorized insignia. The *Manual* also contains a table of maximum punishments (¶ 127c) which lists and prescribes the punishment for a large number of different offenses under Article 134. The pertinent portions of the *Manual*

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covering these matters are set forth in Appendices A, B and C, attached hereto.

Whatever may be the status of the *Manual* as substantive military law,[14] the essential point is that the *Manual* informs members of the armed forces of the types of conduct that Article 134 prohibits. To those in the military community, who are familiar with its customs, practices and traditions, the detailed discussion and specification of the large number of offenses that may be charged under Article 134 gives further precise meaning and content to the generalized con-

[14] The status of the *Manual's* specifications as substantive military law is unsettled. Article 56, UCMJ (10 U.S.C. 856), authorizes the President to prescribe maximum limits of punishment; and Article 36(a), UCMJ (10 U.S.C. 836(a)), empowers him to prescribe "procedure[s], including modes of proof * * * by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts * * *."

The United States Court of Military Appeals has held that Congress did not and could not empower the President to define substantive offenses. *United States* v. *McCormick*, 12 U.S.C.M.A. 26; *United States* v. *Smith*, 13 U.S.C.M.A. 105, 119; cf. *United States* v. *Acostas-Vargas*, 13 U.S.C.M.A. 388. However, in *Reid* v. *Covert*, 354 U.S. 1, 38, this Court observed that "it has not yet been definitely established to what extent the President, as Commander-in-Chief of the armed forces, or his delegates, can promulgate, supplement or change substantive military law * * *."

It may be that the President, as the constitutional Commander-in-Chief of the armed forces, has inherent power to promulgate military law. In *Swaim* v. *United States*, 165 U.S. 553, for example, this Court held that the President, as Commander-in-Chief, had inherent power to convene a general court martial to try an officer. See, Wiener, *Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 361 (1968).

cept of "disorders and neglects to the prejudice of good order and discipline in the armed forces." Members of the armed forces can fully appreciate, in a way that civilians cannot, the significance of such breaches of proper military conduct, all of which are detailed in the specifications under Article 134, as drinking liquor with a prisoner in a soldier's charge, discharging a firearm willfully or through carelessness, gambling with subordinates, impersonating an officer, failing properly to perform the duties of a sentinel, or not maintaining a clean weapon. Similarly, they could have no doubt about the seriousness and the illegality of making disloyal statements to members of the armed forces, with the intention of promoting disloyalty and disaffection among them, particularly in a combat zone.

In recently upholding, against similar claims of vagueness and over-breadth, the constitutionality of the prohibition in the Hatch Act against federal employees taking "an active part in political management or in political campaigns," this Court attached critical importance to the detailed content which the Civil Service Commission had given to that general prohibition by its rulings over the years whether particular activity did or did not violate the prohibition. *United States Civil Service Commission* v. *National Association of Letter Carriers, AFL–CIO, supra.* The *Manual* similarly fills in the details and provides the necessary specificity to give members of the armed forces adequate notice of what Article 134 prohibits them from doing. Since the significant consideration with respect to both the Civil Service Commission's interpretations

of the Hatch Act that this Court relied on in the *Letter Carriers* case and the *Manual* in the present case is that both give persons covered by the statute adequate notice of what it prohibits, it is immaterial that in the Hatch Act the statute specifically referred to the Commission's interpretations, whereas Article 134 is silent with respect to the *Manual*.

The court of appeals did not deny the significance of the *Manual* as a means of giving notice to members of the armed forces of the content of Article 134 and thereby providing greater specificity. It concluded, however, that because the categories of offenses specifically listed as subject to Article 134 have been expanded in recent years and may be further extended, the *Manual* could not properly be regarded as giving adequate specific content to Article 134 (J.S. App. A, p. 20). But the changes that have occurred in the coverage of Article 134, and future changes that may occur, themselves reflect changes in military custom and practice which either are or should be well known to members of the armed forces as they occur and develop. The *Manual* is not intended wholly to explicate that custom and practice. It is an illustrative handbook—available to those subject to the statute and those administering it—which specifies and defines misconduct commonly met with under Article 134, and thereby provides additional notice of the principal applications of the Article. That the number of listed offenses has increased over the years does not show dramatically shifting views within the military as to what is prejudicial to discipline

or service-discrediting, but rather demonstrates a concern to make the specific illustrations more comprehensive.

The court of appeals also stated (J.S. App. A, p. 20) that even where the *Manual* indicates that particular conduct is plainly covered by Article 134, that may not provide sufficient notice because "even conduct listed in the *Manual* must be found prejudicial to good order and discipline or service discrediting." This requirement, however, does not undermine the role of the *Manual* of giving members of the armed forces adequate notice of the conduct that Article 134 prohibits. Rather, this further particularizes and specifies the proscribed activities by making it clear that only those activities that cause prejudice to good order and discipline are illegal. This requirement thus specifically relates the conduct that Article 134 prohibits to the well-established customs and practices of the armed forces.

In effect, therefore, this requirement insures that no member of the armed forces will be convicted under Article 134 unless he reasonably knew that the conduct violated the traditional standards of the military community. Although Article 134 does not in terms require *mens rea*, convictions are practically always for knowing violations of law. See Gaynor, *supra*, *Prejudicial and Discreditable Military Conduct: A Critical Appraisal of the General Article*, 22 Hastings L.J. 259, 288–289. Cf. Wiener, *supra*, *Are The General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. at 364. Many of the standard forms of specification under Article 134 require some form of

mens rea and—as discussed later (*infra*, pp. 35–38)—the specifications in Avrech's case explicitly charged intent and required a finding of intent to convict. Cf., *e.g.*, *United States* v. *Guest*, 383 U.S. 745, 753–754, 765–786 (holding that a *scienter* requirement can save a criminal statute from unconstitutional vagueness); *Screws* v. *United States*, 325 U.S. 91.

In summary, the military's implementation of Article 134 operates to give "fair warning" of the conduct proscribed by the Article. But there is a point beyond which the requirements of Article 134 cannot be specified, lest "the standard of the Army shall come down to the requirements of a criminal code." *Fletcher* v. *United States*, *supra*, 26 Ct. Cl. at 563. As Mr. Wiener stated (*Are the General Military Articles Unconstitutionally Vague?*, 54 A.B.A.J. 357, 363–364):

> [H]ow could Congress possibly legislate in minute detail what are "disorders and neglects to the prejudice of good order and discipline," or specify with particularity "all conduct of a nature to bring discredit upon the armed forces"? Inevitably, new disorders and new misconduct not falling within the legislative enumeration but clearly comprehended under the existing phraseology would occur to the ingenuity of those who are subject to military law.

B. ARTICLE 134 IS NOT OVERLY BROAD

Article 134 is not in terms directed against speech at all; it prohibits all actions that prejudice good military order and discipline. As shown by the discussion in the *Manual* of the various offenses under that Article,

as well as the specifications and table of maximum punishments therefor (see *supra*, pp. 28–30), in most of its applications Article 134 does not deal with speech-related activities but with conduct that implicates no First Amendment interests. There are only a few instances in which the conduct to the prejudice of good military order and discipline described and specified in the *Manual* relates to speech.

As we have noted (see *supra*, pp. 18–19), it is only with respect to statutes that have a chilling effect upon the exercise of First Amendment rights that this Court has invalidated legislation on its face for overbreadth without regard to its impact in the particular case. The alleged overbreadth of Article 134 therefore must be determined not with respect to the probable applications of the Article to the broad gamut of conduct which it covers, but only to the narrower areas in which it operates to penalize speech-related activities. More specifically, the central issue with respect to the alleged overbreadth of Article 134 involves its application to disloyal statements. Does the Article sweep more broadly than is necessary in dealing with that form of activity obviously prejudicial to good military order and discipline?

The answer, we submit, is that the Article does not transgress the grounds of proper breadth in dealing with that subject. The application of the Article to the conduct involved here is particularized by the "disloyal statement" specification, which reads as follows (App. B, *infra*, p. 13a):

> In that ---------- did, (at) (on board) ----------, on or about ---------- 19 --, with design to [promote (dis-

loyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [(interfere with) (impair) the (loyalty,) (morale) (and) (discipline) of members of the Armed Forces of the United States], utter to ---------- the following statement, to wit: "----------", or words to that effect, which statement was disloyal to the United States.

The making of disloyal statements, with the intention of promoting disloyalty and disaffection among the troops or interfering with and impairing their loyalty, morale and discipline, is a serious breach of military discipline. It is one which, unless promptly punished, creates a real danger of impairing the effectiveness and readiness of the armed forces to perform their military mission. Its seriousness is reflected in the fact that the table of maximum punishments permits confinement at hard labor of up to three years as a punishment therefor.

The specification is as narrowly drawn as the nature of the conduct prohibited permits. As is true with respect to the general category of offenses to the prejudice of good military order and discipline which Article 134 prohibits, it is impossible to describe in greater detail the precise kinds of statements that would be disloyal or that would have the prohibited effect upon the troops. In dealing with a subject as subtle and sensitive as the making of disloyal statements, no more can be done than promulgate the kind of general standards that the specification prescribes.

The application of these standards to a particular

statement necessarily must depend upon all the surrounding circumstances in which it was made: the precise words used, the innuendos they conveyed, the audience to which they were directed, their likely impact upon that audience, the military setting in which the statement was made, and its likely effect upon the troops.

The *Manual's* discussion of "disloyal statements undermining discipline and loyalty" illustrates the basic scope of that prohibition by listing three representative examples of "utterances designed to promote disloyalty or disaffection among troops" (¶ 213f (5)): "praising the enemy, attacking the war aims of the United States, or denouncing our form of government." With respect to anti-war statements the Court of Military Appeals has made clear that the specification applies only to active calls for opposition to the military policy of the United States. *United States* v. *Priest,* 21 U.S.C.M.A. 564; *United States* v. *Gray,* 20 U.S.C.M.A. 63; *United States* v. *Harvey,* 19 U.S.C.M.A. 539. As the specification has been construed, it is not aimed at all "[d]isagreement with, or objection to, a policy of the Government," *United States* v. *Harvey, supra,* 19 U.S.C.M.A. at 544, but only at material sufficiently prejudicial to pass the "thin line between rhetoric and disloyalty to the United States."

Moreover, the standard instructions given by military judges make clear that the "utter[ing]" required by the specification entails more than private conversation: "A statement is made 'in public' if it is made

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openly, generally, or notoriously." Military Judge'
Guide, Department of the Army Pamphlet No. 27-9
¶ 4-139 (1 June 1971). The added requirement in th
Manual (¶ 213b) that there must be "direct and pal
pable" prejudice to military effectiveness furthe
assures that the prohibition will not be applied mor
broadly than is necessary.

Since no one may be convicted of violating Articl
134 for this offense unless the statement was disloya
to the United States and was made with the intentio
of impairing the discipline and effectiveness of th
troops, Article 134 is not overbroad insofar as it pro
hibits such statements.

CONCLUSION

For the foregoing reasons the judgment of the cour
of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

MANUAL FOR COURTS-MARTIAL, 1969

213. ARTICLE 134—GENERAL ARTICLE

a. GENERAL

Discussion. Article 134 makes punishable all acts not specifically proscribed in any other article of the code when they amount to disorders or neglects to the prejudice of good order and discipline in the armed forces or to conduct of a nature to bring discredit upon the armed forces, or constitute noncapital crimes or offenses denounced by enactment of Congress or under authority of Congress. If conduct of this nature is specifically made punishable by another article, it should be charged as a violation of that article; and if it is not specifically made punishable by another article, it should be charged as a violation of Article 134. But see 212. The specification alleging a violation of Article 134 need not expressly allege that the conduct was a disorder or neglect, or that it was of a nature to bring discredit upon the armed forces, or that it constituted a crime or offense not capital. Under a specification alleging a violation of Article 134, a finding of guilty may properly be returned if the court-martial is convinced beyond a reasonable doubt that the acts of the accused constituted a disorder or neglect to the prejudice of good order and discipline in the armed forces, that his conduct was of a nature to bring discredit upon the armed forces, or that his conduct violated an applicable statute enacted by or under authority of Congress. The same conduct may constitute a disorder or neglect to the prejudice of good order and discipline in the armed forces and at the same time be of a nature to bring discredit upon the armed forces. Although evidence presented at the trial of an offense alleged under Article 134 may be insufficient to establish the commission of a crime or offense not capital, it may nevertheless be sufficient to establish a disorder or neglect to the prejudice of good order and discipline or service-discrediting conduct and thus support a conviction. See 213*d*.

b. DISORDERS AND NEGLECTS TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE IN THE ARMED FORCES

Discussion. The disorders and neglects punishable under this clause of Article 134 include those acts or omissions to the prejudice of good order and discipline not specifically mentioned in other articles.

"To the prejudice of good order and discipline" refers only to acts directly prejudicial to good order and discipline and not to acts which are prejudicial only in a remote or indirect sense. Almost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense; however, the article does not contemplate these distant effects. It is confined to cases in which the prejudice is reasonably direct and palpable.

Instances of prejudicial disorders and neglects in the case of an officer are rendering himself unfit for duty by excessive use of intoxicants or drugs; drunkenness; and allowing a member of his command to go on duty knowing him to be drunk.

Instances of prejudicial disorders and neglects in the case of enlisted persons are appearing in improper uniform; wrongfully abusive use of military vehicles; careless discharge of firearms; and impersonating an officer.

A *breach of a custom of the service* may result in a violation of this clause of Article 134. In its legal sense the word "custom" imports something more than a method of procedure or a mode of conduct or behavior which is merely of frequent or usual occurrence. Custom arises out of long established practices which by common consent have attained the force of law in the military or other community affected by them. There can be no such thing as a custom that is contrary to existing law or regulation. A custom which has not been adopted by existing statute or regulation ceases to exist when its observance has been long abandoned. Many customs of the service are now set forth in regulations of the various armed forces. Violations of these customs should be charged under Article 92 as violations of the regulations in which they appear.

It is a violation of this article wrongfully to possess or use marihuana or a habit forming narcotic drug. Possession or use of marihuana or a habit forming narcotic drug may be inferred to be wrongful unless the contrary appears. A person's possession or use of a drug is innocent when the drug has been duly prescribed for him by a physician and the prescription has not been obtained by fraud, when he possesses it in the performance of his duty, or when his possession or use of marihuana or a narcotic drug is without knowledge of the presence or the nature of the substance (see 154*a*(4)). If an issue is raised by the evidence as to whether possession or use by an accused charged with this offense was innocent on one of these grounds, a showing that it was not innocent on that ground becomes a requirement of proof.

c. CONDUCT OF A NATURE TO BRING DISCREDIT UPON THE ARMED FORCES

Discussion. "Discredit" as here used means "to injure the reputation of." This clause of Article 134 makes punishable conduct which has a tendency to bring the service into disrepute or which tends to lower it in public esteem. Any discreditable conduct not denounced by a specific article of the code is punishable under this clause. Acts in violation of local civil law may be punished if they are of a nature to bring discredit upon the armed forces. Included within the conduct which may be found to be within the proscription of this

clause are adultery, bigamy, negligent homicide, fleeing the scene of an accident, indecent acts, and dishonorable failure to pay debts.

d. GENERAL REQUIREMENTS OF PROOF UNDER ARTICLE 134

The proof required for conviction of an offense under Article 134 depends upon the nature of the misconduct charged. If the conduct is punished as a crime or offense not capital (213*e*), the proof must establish every element of the crime or offense as required by the applicable law. One element of proof common to every case tried under Article 134, except one tried as a crime or offense not capital, is that the conduct of the accused, under the circumstances, was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. This element is common to all the offenses discussed in 213*f* and should be included in instructions as to the elements of these offenses, in addition to their specific elements. Subject to the foregoing, an offense under either of the first two clauses of Article 134 requires the following proof:

(1) That the accused did or failed to do the acts, as alleged; and

(2) That under the circumstances his conduct was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

e. CRIMES AND OFFENSES NOT CAPITAL

Crimes and offenses not capital which are referred to and made punishable by Article 134 include those acts or omissions, not made punishable by another article, which are denounced as noncapital crimes or offenses by enactments of Congress or under authority of Congress and made triable in the Federal civil courts.

State and foreign laws are not included within the crimes and offenses not capital referred to in Article 134 and violations thereof may not be prosecuted as such except insofar as State law becomes Federal law of local application under section 13 of title 18 of the United States Code. On the other hand, an act which is a violation of a State law or a foreign law may constitute a disorder or neglect to the prejudice of good order and discipline or conduct of a nature to bring discredit upon the armed forces and so be punishable under the first or second clause of Article 134.

For the purpose of court-martial jurisdiction, the laws which may be applied under the clause, "crimes and offenses not capital," are divided into two groups:

(1) *Crimes and offenses of unlimited application.* Certain noncapital crimes and offenses denounced by the United States Code, such as counterfeiting (18 U.S.C. § 471), various frauds against the Government not denounced by Article 132, and other offenses which are directly injurious to the Government and are made punishable wherever committed are made applicable under the third clause of Article 134 to all persons subject to the code regardless of where the wrongful act or omission occurred. The Narcotic Drugs Import and Export Act (21 U.S.C. §§ 171–185) falls within this group, being applicable to the importation of proscribed drugs not only into areas over which the United States is sovereign but also into territories subject to the control of the United States for a special purpose, including military installations on foreign soil.

(2) *Crimes and offenses of local application.* Those noncapital cri and offenses which are listed in the United States Code but which are ited in their applicability to the special maritime and territorial juris tion of the United States as defined in the United States Code, t applicable within the continental United States, and those include the law of the District of Columbia, in the law of a Commonwe Territory or possession of the United States, and in the laws applicabl reservations or places over which the United States has exclusive ju diction or concurrent jurisdiction with a State, which are not specific included in another article of the code, are made applicable under Ar 134 to all persons subject to the code who commit these crimes or offe within the geographical boundaries of the areas in which they are plicable. For the law applicable in a reservation or a place over which United States has exclusive jurisdiction or concurrent jurisdiction wi State, see 18 U.S.C. § 13. A person subject to the code cannot be prosec under the third clause of Article 134 for having committed a crim offense, not capital, if the act occurred in a place where the law in ques did not apply. For example, a person cannot be prosecuted under the t clause of Article 134 for having committed a crime or offense, not cap when the act occurred in occupied foreign territory merely because act would have been an offense against the law of the District of Colu if it had been committed there. Such an act might, however, regardles where committed, in a proper case be prosecuted under the first or sec clause of Article 134 as a disorder or neglect to the prejudice of good o and discipline or as an offense of a nature to bring discredit upon armed forces.

f. VARIOUS TYPES OF OFFENSES UNDER ARTICLE 134

(1) ASSAULTS INVOLVING INTENT TO COMMIT CERTAIN OFFENSES OF A C NATURE

Discussion. See 207 (Assault). The assaults here designated as be punishable under Article 134 are those perpetrated with intent to com murder, voluntary manslaughter, rape, robbery, sodomy, arson, burglary housebreaking. An assault with intent to commit an offense is not necessa the equivalent of an attempt to commit the intended offense, for an ass can be committed with intent to commit an offense without achieving that deg of proximity to consummation of an intended offense which is essential to attempt. See 159.

Some of these assaults will be discussed below.

(a) *Assault with intent to murder.* This is an assault committed w a specific intent to kill, under such circumstances that, if death resulted th from, the offense of murder would have been committed. To constitute an sault with intent to murder with a firearm, it is not necessary that the wea be discharged; and in no case is the actual infliction of injury necessary. T if a man with intent to murder another deliberately assaults him by shoot at him, the fact that he misses does not alter the character of the offense. W the intent to murder exists, the fact that for some unknown reason the act consummation of the murder by the means employed is impossible is no defense if the means are apparently adapted to the end in view. Thus, i

person intending to murder another loads his rifle with what he believes to be a live cartridge and aims and discharges his rifle at the other, it is no defense that, by accident, he used a dummy cartridge.

The intent to murder need not be directed against the person assaulted if the assault is committed with intent to murder some person. If the accused, intending to murder A, shoots at B, mistaking him for A, he is guilty of assaulting B with intent to murder him. Also, if a man fires into a group with intent to murder someone, he is guilty of an assault with intent to murder each member of the group.

(*b*) *Assault with intent to commit voluntary manslaughter.* This is an assault committed with a specific intent to kill under such circumstances that, if death resulted therefrom, the offense of voluntary manslaughter would have been committed. There can be no assault with intent to commit involuntary manslaughter, for involuntary manslaughter is not a crime capable of being intentionally committed.

(*c*) *Assault with intent to commit rape.* This is an assault committed by a man with a specific intent to have sexual intercourse with a woman not his wife by force and without her consent. The accused must have intended to overcome any resistance by force, actual or constructive, and to penetrate the woman's person. Any lesser intent will not suffice. Indecent advances and importunities, however earnest, not accompanied by such an intent, do not constitute this offense, nor do mere preparations to rape not amounting to an assault. Thus, if a man, intending to rape a woman, conceals himself in her room to await a favorable opportunity to execute his design, but before the opportunity arises is discovered and flees, he is not guilty of an assault with intent to commit rape.

No actual touching is necessary. If a man enters a woman's room and gets in the bed where she is for the purpose of raping her, he commits the offense under discussion although he does not touch the woman.

Once an assault with intent to commit rape is made, it is no defense that the man voluntarily desisted.

Lesser offenses that may be included in a charge of assault with intent to rape are indecent assault and assault.

(*d*) *Assault with intent to rob.* This is an assault committed with a specific intent to steal property by taking it from the person or in the presence of another, against his will, by means of force or violence or putting him in fear. The fact that the accused intended to take only money and that the person he intended to rob had none is not a defense.

(*e*) *Assault with intent to commit sodomy.* The assault must be against a human being and must be committed with a specific intent to commit sodomy. Any lesser intent, or different intent, will not suffice.

Proof. (*a*) That the accused assaulted a certain person, as alleged; (*b*) that the accused at the time of the assault had a specific intent to kill, as required for murder or voluntary manslaughter, or to commit rape, robbery, sodomy, arson, burglary, or housebreaking, as alleged; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(2) INDECENT ASSAULT

Discussion. See 207 (Assault). An indecent assault is the taking by a man of indecent, lewd, or lascivious liberties with the person of a female not his wife without her consent and against her will, with intent to gratify his lust or sexual desires. In a proper case indecent assault may be an included offense of assault with intent to commit rape.

Proof. (*a*) That the accused assaulted a certain female not his wife by taking indecent, lewd, or lascivious liberties with her person; (*b*) that the acts were done with intent to gratify the lust or sexual desires of the accused; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(3) INDECENT ACTS WITH A CHILD UNDER THE AGE OF 16 YEARS

Discussion. This offense consists of taking any immoral, improper or indecent liberties with, or the commission of any lewd or lascivious act upon or with the body of any child of either sex under the age of 16 years with the specific intent of arousing, appealing to, or gratifying the lust or passions or sexual desires, either of the person committing the act, or of the child, or of both. When the accused is charged with taking indecent liberties, the liberties must be taken in the physical presence of the child, but it is not essential that the evidence show physical contact between the accused and the child. Thus, one who with the requisite intent exposes his private parts to a child under the age of sixteen years may be found guilty of this offense. Nonconsent by the child to the act or conduct is not essential to this offense, nor is consent a defense.

Proof. (*a*) That the accused took certain immoral, improper or indecent liberties with a certain child, as alleged; or that he performed a certain lewd or lascivious act upon or with the body of a certain child, as alleged; (*b*) that the child was under the age of 16 years, as alleged; (*c*) that the intent of the accused was to arouse, appeal to, or gratify the lust or passions or sexual desires of the accused or the child or both, as alleged; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(4) FALSE SWEARING

Discussion. False swearing is the making under lawful oath, not in a judicial proceeding or course of justice, of any false statement, oral or written, not believing the statement to be true. It may consist, for example, in making a false oath to an affidavit. The oath may be taken before any person authorized by law to administer oaths. See Article 136 and chapter XXII as to the authority of certain persons to administer oaths, and see 147*a* as to taking judicial notice of the signatures of persons authorized to administer oaths. An oath includes an affirmation when the latter is authorized in lieu of an oath.

The principles set forth in the last two paragraphs of the discussion of perjury in 210 apply also to false swearing.

Proof. (*a*) That the accused took an oath or its equivalent, as alleged; (*b*) that the oath was administered to the accused in a matter in which an oath was required or authorized by law; (*c*) that the oath was administered by a

person having authority to do so; (*d*) that upon this oath the accused made or subscribed a certain statement, as alleged; (*e*) that the statement was false; (*f*) that the accused did not believe the statement to be true; and (*g*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(5) DISLOYAL STATEMENT UNDERMINING DISCIPLINE AND LOYALTY

Discussion. Certain disloyal statements by military personnel may lack the necessary elements to constitute an offense under 18 U.S.C. §§ 2385, 2387, and 2388, but nevertheless, under the circumstances, be punishable as conduct to the prejudice of good order and discipline or conduct reflecting discredit upon the armed forces. Examples are utterances designed to promote disloyalty or disaffection among troops, as praising the enemy, attacking the war aims of the United States, or denouncing our form of government.

Proof. (*a*) That the accused made the disloyal statement, as alleged; (*b*) that the accused at the time of making the statement did so with the design alleged; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(6) MISPRISION OF A FELONY

Discussion. A person who has knowledge of the actual commission of a felony by another and who conceals and does not as soon as possible make known the same to the civil or military authorities is guilty of misprision of the felony. Any offense of a civil nature punishable under the authority of the code by death or by confinement for a term exceeding one year is a felony. A mere failure or refusal to disclose the felony without some positive act of concealment does not make one guilty of this offense. Making a false entry in an account book for the purpose of concealing a felonious theft committed by another, and intimidating a witness of a felony, are examples of a positive act of concealment.

Proof. (*a*) That the accused had knowledge of the actual commission of a felony by another; (*b*) that he concealed and did not as soon as possible make known the felony to the civil or military authorities; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(7) DISHONORABLE FAILURE TO PAY DEBTS

Discussion. A dishonorable failure to pay a just debt under circumstances which bring or tend to bring discredit upon the armed forces or which are prejudicial to good order and discipline in the armed forces is an offense under this article. More than mere negligence in the nonpayment is necessary. The failure to pay must be characterized by deceit, evasion, false promises, or other distinctly culpable circumstances indicating a deliberate nonpayment or grossly indifferent attitude toward one's just obligations.

For a debt to form the basis for this offense, the accused must not have had a defense, or an equivalent offset or counterclaim, either in fact or according to his belief, at the time alleged. The offense should not be charged if there

was a genuine dispute between the parties as to the facts or law relating to the debt which would affect the obligation of the accused to pay. The offense is not committed if the creditor or creditors involved are satisfied with the conduct of the debtor with respect to payment.

The length of the period of nonpayment and any denial of his indebtedness which the accused may have made may tend to prove that his conduct was dishonorable, but the court-martial may convict only if it finds from all of the evidence that his conduct was in fact dishonorable.

A commissioned officer may be tried for this offense under either Article 133 or Article 134, as the circumstances may warrant.

Proof. (*a*) That the accused was indebted to a certain person or entity in a certain sum, as alleged; (*b*) that the debt became due and payable on or about a certain date, as alleged; (*c*) that at the time alleged while the debt was still due and payable, the accused dishonorably failed to pay the debt; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(5) DISHONORABLE FAILURE TO MAINTAIN FUNDS FOR PAYMENT OF CHECKS

Discussion. One who, having made and uttered a check, thereafter dishonorably fails to maintain sufficient funds in or credit with the drawee bank for its payment upon presentment, is chargeable under this article. This offense differs from the offense denounced by Article 123a in that there need be no intent to defraud or deceive at the time of making, drawing, uttering or delivery, and that the accused need not know at that time that he did not or would not have sufficient funds for payment. The gist of the offense lies in the conduct of the accused after uttering the instrument.

Mere negligence in maintaining one's bank balance is insufficient as a basis for this offense, and the accused's conduct must reflect bad faith or gross indifference in this regard. As in 213*f*(7), dishonorable conduct of the accused is necessary, and the other principles discussed in 213*f*(7) likewise apply.

Proof. (*a*) That the accused made and uttered a certain check, as alleged; (*b*) that thereafter the accused dishonorably failed to maintain funds in or credit with the drawee bank for payment of the check upon its presentment for payment in due course; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(6) BIGAMY

Discussion. Bigamy is the contracting of another marriage by one who already has a lawful spouse living. If a prior marriage was void, it will have created no status of "lawful spouse." However, if it was merely voidable and has not been voided by competent court action, this circumstance is no defense. A belief that a prior marriage has been terminated by divorce, death of the other spouse, or otherwise, constitutes a defense only if the belief was reasonable (154*a*(4)).

Proof. (*a*) That, at the time and place alleged, the accused married a certain person, as alleged; (*b*) that, at the time of this marriage there existed a prior valid marriage entered into by the accused with another person, to

alleged, which prior marriage was then undissolved; and (*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(10) COMMUNICATING A THREAT

Discussion. This offense consists of wrongfully communicating an avowed present determination or intent to injure the person, property, or reputation of another presently or in the future. The communication may be made to the person threatened or to another. To establish the threat it is necessary to show that the declaration in question was made. It is not necessary, however, that the accused actually entertained the intention stated in the declaration. However, a declaration made under circumstances which reveal it to be in jest or for an innocent or legitimate purpose, or which contradict the expressed intent to commit the act, does not constitute this offense. Nor is the offense committed by the mere statement of intent to commit an unlawful act not involving injury to another.

Proof. (*a*) That the accused communicated certain language expressing a present determination or intent wrongfully to injure another person, as alleged, presently or in the future; (*b*) that the communication was made known to that person or to a third person, as alleged; (*c*) that the communication was wrongful and without justification or excuse; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(11) FALSE AND UNAUTHORIZED PASSES, PERMITS, DISCHARGE CERTIFICATES, AND IDENTIFICATION CARDS

Discussion. Certain acts with respect to military or official passes, permits, discharge certificates, or identification cards may be punishable under this article. The wrongful use, possession, sale, or other disposition of a false or unauthorized pass, permit, discharge certificate, or identification card with knowledge that it was false or unauthorized may be charged under this article. Although it is not necessary that the use, possession, sale, or disposition of the document be with an intent to deceive or defraud, the use or possession of a false or unauthorized document with such an intent is an aggravating circumstance authorizing more severe punishment. See 127*c*. See also 202A for a definition of intent to deceive and intent to defraud. The false making or altering of a military or official pass, permit, discharge certificate, or identification card may also be charged under this article. As to this offense, there is no requirement of knowledge or of an intent to deceive or defraud. The phrase "military or official pass, permit, discharge certificate, or identification card" includes, as well as the more usual forms of these documents, all documents issued by any governmental agency for the purpose of identification and copies and facsimiles thereof.

Proof. Wrongful use or possession of a false or unauthorized pass, permit, discharge certificate, or identification card. (*a*) That the accused wrongfully used or had in his possession a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (*b*) that the pass, permit, discharge certificate, or identification card was false or unauthorized as

alleged; (*c*) that the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces; and, if alleged, (*e*) that the use or possession was with intent to deceive or defraud.

Wrongful sale or disposition of a pass, permit, discharge certificate or identification card. (*a*) That the accused wrongfully sold or disposed of a certain military or official pass, permit, discharge certificate, or identification card, as alleged; (*b*) that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; (*c*) that the accused knew that the pass, permit, discharge certificate, or identification card was false or unauthorized, as alleged; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Falsely making or altering a pass, permit, discharge certificate, or identification card. (*a*) That the accused wrongfully and falsely made or altered a certain military or official pass, permit, discharge certificate, or identification card, as alleged; and (*b*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(12) NEGLIGENT HOMICIDE

Discussion. Negligent homicide is any unlawful homicide which is the result of simple negligence. Simple negligence is a lesser degree of carelessness than culpable negligence. See 198*b*. It is the absence of due care, that is, an act or omission of a person who is under a duty to use due care which exhibits a lack of that degree of care for the safety of others which a reasonably prudent man would have exercised under the same or similar circumstances.

Proof. (*a*) That the person named or described is dead; (*b*) that his death was unlawfully caused by the acts or omissions of the accused, as alleged; (*c*) that the acts or omissions of the accused constituted negligence; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(13) OFFENSES AGAINST CORRECTIONAL CUSTODY

Discussion. Escape from correctional[1] custody is the act of a person undergoing the punishment of correctional custody pursuant to Article 15 (131*c*(4)) who, before being set at liberty by proper authority, casts off any physical restraint imposed by his custodian or by the place or conditions of custody. Breach of restraint during correctional custody is the act of a person undergoing the punishment who, in the absence of physical restraint imposed by a custodian or by the place or conditions of custody, breaches any form of restraint imposed during this period. See 57*b* as to the manner of determining the legality of the imposition of correctional custody.

Proof. Escape from correctional custody. (*a*) That the accused was duly placed in correctional custody; (*b*) that, at the time and place alleged, the accused freed himself from the physical restraint of his correctional custody, as alleged, before having been released therefrom by proper authority; and

(*c*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

Breach of correctional custody. (*a*) That the accused was duly placed in correctional custody; (*b*) that while in such correctional custody, a certain restraint was imposed upon the accused; (*c*) that, at the time and place alleged, the accused broke this restraint, before having been released from the correctional custody or relieved of the restraint by proper authority; and (*d*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

(14) RECEIVING STOLEN PROPERTY

Discussion. "Receiving stolen property" is the receiving, buying, or concealing of any article or thing of value, the property of another person, with knowledge that the article or thing has been stolen.

While an actual thief is not criminally liable for receiving the property he has stolen, one who may be criminally responsible as a principal to the larceny, when not the actual thief (156), can be convicted of knowingly receiving the stolen property under Article 134. Thus, if A procures B to steal several items, agreeing to pay him a certain price for them, and B subsequently steals them and delivers them to A, A can be found guilty of knowingly receiving stolen property despite the fact that his conduct would make him guilty of larceny as a principal.

Proof. (*a*) That the accused received, bought, or concealed certain property of a value alleged; (*b*) that the property belonged to another person named or described; (*c*) that the property had been stolen; (*d*) that the accused then knew that the property had been stolen; and (*e*) that, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

APPENDIX B

ARTICLE 134

Abusing public animal

126. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully (kick a public horse in the belly) (_____).

Adultery

127. In that _____ (, a married man,) did, (at) (on board) _____, on or about _____ 19___, wrongfully have sexual intercourse with _____, (a married woman) (a woman) not his wife.

Assault: —Indecent

128. In that _____ did, (at) (on board) _____, on or about _____ 19___, commit an indecent assault upon _____ by _____, with intent to gratify his (lust) (sexual desires).

—With intent to commit certain offenses

129. In that _____ did, (at) (on board) _____, on or about _____ 19___, with intent to commit (murder) (voluntary manslaughter) (rape) (robbery) (sodomy) (arson) (burglary) (housebreaking), commit an assault upon _____ by _____.

Bigamy

130. In that _____ did, at _____, on or about _____ 19___, wrongfully and bigamously marry _____, having at the time of his said marriage to _____ a lawful wife then living, to wit: _____

Bribery and graft: —Asking, accepting, or receiving

131. In that _____, being at the time (a contracting officer for _____) (the personnel officer of _____) (_____), did, (at) (on board) _____, on or about _____ 19___, wrongfully and unlawfully (ask) (accept) (receive) from _____ (a contracting company engaged in _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), [with intent to have his (decision) (action) influenced with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by him the said _____ in relation to] an official matter in which the United States was and is interested, to wit: (the purchasing of military supplies from _____) (the transfer of _____ to duty with _____) (_____).

—Promising, offering, or giving

122. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully (promise) (offer) (give) to _____, (his commanding officer) (the claims officer of _____) (_____), (the sum of $_____) (_____, of a value of (about) $_____) (_____), [with intent to influence the (decision) (action) of the said _____ with respect to] [(as compensation for) (in recognition of) services (rendered) (to be rendered) (rendered and to be rendered) by the said _____ in relation to] an official matter in which the United States was and is interested, to wit: (the granting of leave to _____) (the processing of a claim against the United States in favor of _____) (_____).

Burning with intent to defraud

123. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and maliciously (burn) (set fire to) (a dwelling) (a barn) (an automobile), the property of _____, with intent to defraud (the insurer thereof, to wit: _____) (_____).

Check, worthless, making and uttering (by dishonorably failing to maintain sufficient funds)

124. In that _____ did, (at) (on board) _____, on or about _____ 19__, make and utter to _____ a certain check, in words and figures as follows, to wit: _____, (for the purchase of _____) (in payment of a debt) (for the purpose of _____), and did thereafter dishonorably fail to (place) (maintain) sufficient funds in the _____ Bank for payment of such check in full upon its presentment for payment.

Correctional custody; —escape from

125. In that _____, while duly undergoing the punishment of correctional custody, did, (at) (on board) _____, on or about _____ 19__, escape from correctional custody.

—breach of restraint during

126. In that _____, while duly undergoing the punishment of correctional custody, did, (at) (on board) _____, on or about _____ 19__, breach the restraint imposed thereunder by _____.

Criminal libel

127. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully, maliciously, and without justifiable cause (communicate to _____) (publish) (circulate among _____) a defamatory statement in writing concerning _____, a member of the U.S. (Army) (_____), (substantially) as follows: _____.

Debt, dishonorably failing to pay

128. In that _____, being indebted to _____ in the sum of $_____ for _____, which amount became due and payable (on) (about) (on or about) _____ 19__, did, (at) (on board) _____, from _____ 19__ to _____ 19__, dishonorably fail to pay said debt.

Disloyal statements

129. In that _____ did, (at) (on board) _____, on or about _____ 19__, with design to [promote (disloyalty) (disaffection) (disloyalty and disaffection) among (the troops) (the civilian populace) (the troops and the civilian populace)] [(interfere with) (impair) the (loyalty,) (morale) (and) (discipline) of members of the Armed Forces of the United States], utter to _____ the following statement, to wit: "_____", or words to that effect, which statement was disloyal to the United States.

Disorderly, drunkenness —in command, quarters, etc., under service discrediting circumstances

130. In that _____ was, (at) (on board) _____, on or about _____ 19__, (drunk) (disorderly) (drunk and disorderly) [in (command) (quarters) (station) (camp) (_____)] [on board ship] [in uniform in a public place, to wit: _____] [_____].

—Drinking liquor with prisoner

131. In that _____, a (sentinel) (_____) in charge of prisoners, did, (at) (on board) _____, on or about _____

19___, unlawfully drink intoxicating liquor with _____, a prisoner under his charge.

—Drunk, prisoner found

142. In that _____, a prisoner, was, (at) (on board) _____, on or about _____ 19___, found drunk.

—Incapacitating unanif for performance of duties through prior indulgence in intoxicating liquors

143. In that _____ was, (at)' (on board) _____, on or about _____ 19___, as a result of previous indulgence in intoxicating liquor, incapacitated for the proper performance of his duties.

Drugs, habit forming, or marihuana: —Wrongful possession —Wrongful use, transfer, or sale

144. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully have in his possession _____ ounces, more or less, of (a habit forming narcotic drug, to wit: _____) (marihuana).

145. In that _____ did, (at)' (on board) _____, on or about _____ 19___, wrongfully (use) (transfer) (sell) (a habit forming narcotic drug, to wit: _____) (marihuana).

—Wrongful introduction into military unit, etc.

146. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully introduce _____ ounces, more or less, of (a habit forming narcotic drug, to wit: _____) (marihuana) into a military (unit) (base) (station) (post) (ship) (aircraft) (_____), to wit: _____, for the purpose of (use) (transfer)' (sale) (_____).

False or unauthorized pass offenses

147. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully [and falsely (make) (forge) (alter by _____) (counterfeit) (tamper with by _____)] [sell to _____] [give to _____] [dispose of by _____] [(use) (have in his possession)] *[with intent to (defraud) (deceive)] (a certain instrument purporting to be) (a)' (an) (another's) (naval) (military) (official) (pass) (permit) (discharge certificate) (identification card) (_____) in words and figures as follows: _____, [he, the said _____, then well knowing the same to be (false)' (unauthorized) (_____)].

*In alleging possession or use, the allegation of intent to defraud or to deceive identifies the more serious offense; if this allegation is omitted, an offense of lesser gravity is charged. See Section A, 137c, and 212f(11).

False pretenses, obtaining services under

148. In that _____ did, (at) (on board) _____, on or about _____ 19___, with intent to defraud, falsely pretend to _____ that _____, then knowing that the pretenses were false, and by means thereof did wrongfully and unlawfully obtain from _____ services of a value of (about) $_____, to wit: _____.

False swearing

149. In that _____ did, (at) (on board) _____, on or about _____ 19___, (in an affidavit)' (in _____), wrongfully and unlawfully (make) (subscribe) under lawful (oath) (affirmation) a false statement in substance as follows: _____, which statement he did not then believe to be true.

Firearm, discharging: —Through carelessness

150. In that _____ did, (at) (on board) _____, on or about _____ 19___, through carelessness, discharge a (service rifle) (_____) in the (squadroom) (tent) (barracks) (_____ compartment) (_____)' of _____.

—Willfully, under such circumstances as to endanger life

151. In that _____ did, (at) (on board) _____, on or about _____ 19___, wrongfully and willfully discharge a firearm, to wit: _____, (in the mess hall of _____) (_____), under circumstances such as to endanger human life.

Fleeing scene of accident

152. In that _____, being (the driver of) (a passenger in) (the senior officer in) (_____ in) a vehicle at the time of (an accident) (a collision) in which said vehicle was involved, did, at _____, on or about _____ 19___, (wrongfully and willfu-

leave) *(by _____, aid and abet the driver of the said ...le in wrongfully and unlawfully leaving) the scene of the (accident) ...sion) without [rendering assistance to _____, who had been ...k (and injured) by the said vehicle] [making (his) *(the driver's) ...ity known].

*These allegations are appropriate when the accused was not the driver of the ...le.

Gambling with subordinate

158. In that (Sergeant) (_____) _____ (, boat-...n's mate first class, U.S. Navy,) (_____,) did, (at) (on ...d) _____, on or about _____ 19__, gamble with ...vate) (_____) _____ (, seaman apprentice, U.S. ...r) (_____).

Homicide, negligent

154. In that _____ did, (at) (on board) _____, on or ...t _____ 19__, unlawfully kill _____, [by negli-...ly _____ the said _____ (in) (on) the _____ ...a _____] [by driving a (motor vehicle) (_____) ...et the said _____ in a negligent manner] [_____].

Impersonating a commissioned, warrant, noncommissioned, or petty officer, or an agent or official

155. In that _____ did, (at) (on board) _____, on ...bout _____ 19__, wrongfully, willfully, and unlawfully im-...nate a [(commissioned officer) (warrant officer) (noncommissioned ...r) (petty officer) (agent of superior authority) of the (Army) ...ry) (Marine Corps) (Air Force) (Coast Guard)] [an official of the ...rnment of _____] by [publicly wearing the uniform and ...nia of rank of a (lieutenant of the _____) (_____)] ...wing the credentials of _____] [_____] (with intent ...defraud _____ by _____).

Indecent acts with a child

156. In that _____ did, (at) (on board) _____, on ...bout _____ 19__, [take (immoral) (improper) (indecent) ...ties with] [commit a (lewd) (lascivious) act (upon) (with) the body ...of _____, a (female) (male) under sixteen years of age, by ...ding (her) (him) and placing his hands upon (her) (his) leg and ...ate parts] [_____], with intent to (arouse) (appeal to) ...tify) the (lust) (passions) (sexual desires) of the said _____ ...(_____).

Indecent exposure

157. In that _____ did, (at) (on board) _____, on ...ost _____ 19__, while (at a barracks window) (_____) ...ally and wrongfully expose in an indecent manner to public view ...

Indecent, insulting, or obscene language communicated to a female or a child under the age of 16 years

158. In that _____ did, (at) (on board) _____, on ...bout _____ 19__, (orally) (in writing) communicate ...to _____, a (female) (child under the age of 16 years), certain ...ment) (insulting) (obscene) language, to wit: _____

Indecent, lewd acts with another

159. In that _____ did, (at) (on board) _____, on ...ost _____ 19__, wrongfully commit an indecent, lewd, and ...lous act with _____ by _____

Mail, taking, opening, secreting, destroying, or stealing

160. In that _____ did, (at) (on board) _____, on ...ost _____ 19__, wrongfully and unlawfully take certain mail ..., to wit: (a) [letter(s)] [postal card(s)] [package(s)], addressed ...to _____, [out of the (_____ Post Office _____) ...ivery room of _____) (unit mail box of _____) ...(_____)] [from _____] before (it) (they) (was) ...(were) (delivered) (actually received) (to) (by) the person(s) to ...whom (it) (they) (was) (were) directed, with design to [obstruct the ...correspondence] [pry into the (business) (secrets)] of _____

161. In that _____ did, (at) (on board) _____, on or ...about _____ 19__, [wrongfully and unlawfully (open) (secret) ...(keep)] [steal] certain mail matter, to wit: (a) [letter(s)] [postal

card(s)] [package(s)] addressed to _____, which said [letter(s)] [_____] [(was) (were) then [in the (_____ Post Office _____) (orderly room of _____) (unit mail box of _____) (custody of _____) (_____)] [on the (bunk of _____) (_____)]] [had previously been committed to _____, (a representative of _____,) an official agency for the transmission of communications,] before said [letter(s)] [_____] (was) (were) (delivered) (actually received) (to) (by) the person(s) to whom (it) (they) (was) (were) directed.

Mails, depositing, etc., obscene matter in

162. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and knowingly (deposit) (cause to be deposited) in the (United States) (_____) mails, for mailing and delivery to _____, a (letter) (picture) (_____) (containing) (portraying) (suggesting) (_____) certain obscene, lewd, and lascivious matter, to wit: _____.

Misprision of felony

163. In that _____, having knowledge that _____ had actually committed a felony (at) (on board) _____, on or about _____ 19__, to wit: (the murder of _____) (_____), did, from about _____ 19__, to about _____ 19__, wrongfully and unlawfully conceal such felony and fail to make the same known to the civil or military authorities.

Nuisance, committing

164. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully (urinate) (defecate) (_____) [on the floor of the squadroom] [on the (deck) (bulkhead) of _____] [_____].

Obstructing justice

165. In that _____ did, (at) (on board) _____, on or about _____, 19__, wrongfully and unlawfully endeavor to [impede (a trial by court-martial) (an investigation) (_____)] [influence the actions of _____, (a member of the court-martial) (the military judge of the court-martial) (a trial counsel of the court-martial) (a defense counsel of the court-martial) (an officer responsible for making a recommendation concerning disposition of charges) (an officer responsible for taking action with respect to the findings and sentence of the court-martial) (_____)] [(influence) (alter) the testimony of _____ as a witness before (a court-martial) (an investigating officer) (_____)] in the case of _____, by [(promising) (offering) (giving) to the said _____, (the sum of $_____) (_____, of a value of (about) $_____)] [communicating to the said _____ a threat to _____] [_____], (if) (unless) he, the said _____, would [(vote to acquit the said _____) (_____) (recommend dismissal of the charge against the said _____) (disapprove the findings and sentence in the case of _____ and order the charges dismissed)] [(wrongfully refuse to testify) (testify falsely concerning _____) (_____)] [(at such trial) (before such investigating officer)] [_____].

Pandering

166. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully [(compel) (induce) (entice) (procure)] [attempt to (compel) (induce) (entice) (procure)] _____ to engage in (acts of prostitution) (sexual intercourse for hire and reward) with persons to be directed to (him) (her) by the said _____.

167. In that _____ did, (at) (on board) _____, on or about _____ 19__, wrongfully and unlawfully [receive valuable consideration, to wit: _____, on account of arranging for] [arrange for] (_____) (unnamed persons) to engage in (sexual intercourse) (sodomy) with _____, (a prostitute) (_____).

168. In that _____, a prisoner on parole, did, (at) (on board) _____, on or about _____ 19__, violate the conditions of his parole by _____. Parole, violation of

169. In that _____, having taken a lawful oath [in a proceeding before (a board of officers) (a court of inquiry) concerning _____] [upon the making of an affidavit as to _____] [_____], a case in which a law of the United States authorized an oath to be administered, that [he, the said _____, would (testify) (declare) (depose) (certify) truly] [a written (declaration) (deposition) (certificate) subscribed by him was true], did, (at) (on board) _____, on or about _____ 19__, willfully and contrary to such oath (state) (subscribe) a material matter, to wit: _____, which matter he did not then believe to be true. Perjury, statutory

170. In that _____ did, (at) (on board) _____, on or about _____ 19__, procure _____ to commit perjury by inducing him, the said _____, to take a lawful (oath) (affirmation) in a (trial by _____ court-martial of _____) (trial by a court of competent jurisdiction, to wit: _____ of _____) (deposition for use in a trial by _____ of _____) (_____) that he, the said _____, would (testify) (depose) (_____) truly, and to (testify) (depose) (_____) willfully, corruptly, and contrary to such (oath) (affirmation) in substance that _____, which (testimony) (deposition) (_____) was upon a material matter and which the said _____ did not then believe to be true. Perjury, subornation of

171. In that _____, (a sentinel) (overseer) (_____) in charge of prisoners, did, (at) (on board) _____, on or about _____ 19__, wrongfully allow _____, a prisoner under his charge, to [(go to) (enter) (go to and enter) an unauthorized place, to wit: _____] [(hold unauthorized conversation with _____) (loiter) (neglect his task by _____) (obtain intoxicating liquor) (_____)]. Prisoner, allowing to do unauthorized act

172. In that _____ did, (at) (on board) _____, on or about _____ 19__, willfully and unlawfully [(alter) (conceal) (remove) (mutilate) (obliterate) (destroy)] [appropriate with intent to (alter) (conceal) (remove) (mutilate) (obliterate) (destroy) (steal)] a public record, to wit: [the (descriptive list) (rough deck log) (quartermaster's note book) of _____] [_____]. Public record, altering, concealing, removing, mutilating, obliterating, or destroying

173. In that _____, having been duly placed in medical quarantine (in the isolation ward, _____ Hospital) (_____), did (at) (on board) _____, on or about _____ 19__, break said medical quarantine. Quarantine, medical, breaking

174. In that _____, being in the presence of (a) (an) [(general) (special) court-martial] [duly appointed board of officers] [officer conducting an investigation under Article 32, Uniform Code of Military Justice] [officer taking a deposition] [_____] (of) (for) the United States, of which _____ was (military judge) (president) (_____), (and having been directed by the said _____ to qualify as a witness) (and having qualified as a witness and having been directed by the said _____ to answer the following questions put to him as a witness, "_____"), did, (at) (on board) _____, on or about _____ 19__, wrongfully refuse (to qualify as a witness) (to answer said questions). Refusing, wrongfully, to testify

175. In that _____, having been duly restricted to the limits of _____, did, (at) (on board) _____, on or about _____ 19__, break said restriction. Restriction, breaking

176. In that _____, (a prisoner), did, (at) (on board) _____, on or about _____ 19__, wrongfully [use the following (threatening) (insulting) (threatening and insulting) language] Sentinel, lookout, offenses against or by

[behave in (a) (an) (insubordinate) (disrespectful) (insubordinate an
disrespectful) manner] toward _____, a (sentinel) (lookout) in t
execution of his duty, ["_____," or words to that effect] [
_____].

177. In that _____, while posted as a (sentinel) (lookout
did, (at) (on board) _____, on or about _____ 19
(loiter) (wrongfully sit down) on his post.

Soliciting another to commit an offense

178. In that _____ did, (at) (on board) _____,
or about _____ 19__, wrongfully (solicit) (induce) _____
(to disobey a general regulation, to wit: _____) (to ste
_____, of a value of (about) $_____, the property
_____) (to _____), by _____.

NOTE. See Article 82 for certain solicitations which should be charged und
that article.

Stolen property, knowingly receiving, buying, concealing

179. In that _____ did, (at) (on board) _____,
or about _____ 19__, unlawfully (receive) (buy) (conceal
_____, of a value of (about) $_____, the property
_____, which property, as he, the said _____, then w
knew, had been stolen.

Struggling

180. In that _____ did, at _____, on or abo
_____ 19__, while accompanying his organization on (a practi
march) (maneuvers) (_____), without just cause, struggle.

Threat, communicating

181. In that _____ did, (at) (on board) _____,
or about _____ 19__, wrongfully communicate to _____
a threat to (injure _____ by _____) (accuse _____
of having committed the offense of _____) (_____).

Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce

182. In that _____ did, (at) (on board) _____
(between _____ and _____) on or about _____
19__, unlawfully transport (a motor vehicle) (an aircraft) in (interstat
(foreign) commerce, then knowing the said (motor vehicle) (aircraft)
have been stolen.

Unclean accouterment, arms, or uniform

183. In that _____ was, (at) (on board) _____,
or about _____ 19__, found with an unclean (rifle) (uniform
(_____), he being at fault in failing to maintain such property
a clean condition.

Uniform, unclean, improper appearing in

184. In that _____ did, on or about _____ 19
wrongfully appear (at) (on board) _____ (without h
_____) (in an unclean _____) (with an uncle
_____) (_____).

Unlawful entry

185. In that _____ did, (at) (on board) _____,
or about _____ 19__, unlawfully enter the (dwelling hous
(garage) (warehouse) (tent) (vegetable garden) (orchard) (staterooms
(_____) of _____.

Weapon, concealed, carrying

186. In that _____ did, (at) (on board) _____,
or about _____ 19__, unlawfully carry a concealed weapon,
wit: a _____.

Wearing unauthorized insignia, decoration, badge, ribbon, or lapel button

187. In that _____ did, (at) (on board) _____,
or about _____ 19__, wrongfully and without authority we
upon his (uniform) (civilian clothing) [the insignia of grade of a (mas
sergeant of _____) (chief gunner's mate of _____)
[the Combat Infantryman Badge] [the Distinguished Service Cross] [t
ribbon representing the Silver Star] [the lapel button representing th
Legion of Merit] [_____].

Wrongful cohabitation

188. In that _____ did, (at) (on board) _____
from about _____ 19__, to about _____ 19__, wrongfu
cohabit with _____, a woman not his wife.

APPENDIX C

TABLE OF MAXIMUM PUNISHMENTS

Article	Offense	Punishment: Dishonorable discharge, forfeiture of all pay and allowances	Punishment: Bad-conduct discharge, forfeiture of all pay and allowances	Punishment: Confinement at hard labor not to exceed— Years	Punishment: Confinement at hard labor not to exceed— Months	Punishment: Forfeiture of two-thirds pay per month not to exceed— Months
134	Abusing a public animal				6	3
	Adultery	Yes		1		
	Assault:					
	Indecent	Yes		5		
	With intent to commit voluntary manslaughter, robbery, sodomy, arson or burglary	Yes		10		
	With intent to commit housebreaking	Yes		5		
	With intent to commit murder or rape	Yes		20		
	Bigamy	Yes		2		
	Bribe or graft, accepting, asking, receiving, offering, or promising	Yes		5		
	Burning with intent to defraud	Yes		10		
	Check, worthless, making and uttering (by dishonorably failing to maintain sufficient funds)		Yes		6	
	Correctional custody:					
	Escape from	Yes		1		
	Breach of restraint during		Yes		6	
	Criminal libel	Yes		5		
134	Debt, dishonorably failing to pay		Yes		6	
	Disloyal statements undermining discipline and loyalty, uttering	Yes		5		
	Disorderly:					
	In command, quarters, station, camp, or on board ship				1	1
	Under such circumstances as to bring discredit upon the military service				4	4
	Drinking liquor with a prisoner				3	3
	Drugs, habit forming, wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft	Yes		10		
	Drugs, marihuana, wrongful possession, sale, transfer, use or introduction into a military unit, base, station, post, ship or aircraft	Yes		5		
	Drunk:					
	Aboard ship				3	3
	In command, quarters, station, or camp				1	1
	Prisoner found				3	3
	Under such circumstances as to bring discredit upon the military service				3	3
	Incapacitating self to perform duties through prior indulgence in intoxicating liquor				3	3
	Drunk and disorderly:					
	Aboard ship		Yes		6	
	In command, quarters, station, or camp				3	3
	Under such circumstances as to bring discredit upon the military service				6	6

TABLE OF MAXIMUM PUNISHMENTS—Continued

Article	Offense	Punishments				
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—		Forfeiture of two-thirds pay per month not to exceed—
				Years	Months	Months
134	False or unauthorized military pass, permit, discharge certificate, or identification card:					
	Making, altering, selling	Yes		5		
	Possessing or using with intent to defraud or deceive	Yes		3		
	Other cases		Yes		6	
	False pretenses, obtaining services under:					
	Of a value of $50 or less		Yes		6	
	Of a value of $50 or less and more than $20		Yes	1		
	Of a value of more than $50	Yes		5		
	False swearing	Yes		3		
	Firearm, discharging:					
	Through negligence				3	3
	Wrongfully and willfully, under circumstances as to endanger life	Yes		1		
	Fleeing from the scene of an accident		Yes		6	
	Gambling by a noncommissioned or petty officer, with a person of lower military grade					3
	Homicide, negligent		Yes	1		
	Impersonating an officer, warrant officer, noncommissioned or petty officer, or agent of superior authority:					
	With intent to defraud	Yes		3		
	All other cases		Yes		6	
	Indecent acts or liberties with a child under the age of 16 years	Yes		7		
	Indecent exposure of person				6	3
	Indecent, insulting, or obscene language:					
	Communicated to a female of the age of 16 years or over	Yes		1		
	Communicated to any child under the age of 16 years.[1]	Yes		2		
134	Indecent or lewd acts with another	Yes		5		
	Mail matter in the custody of the Post Office Department or in the custody of any other agency, or not yet delivered or received; taking, opening, obstructing, secreting, destroying, stealing, or detaining	Yes		5		
	Mails, depositing or causing to be deposited obscene or indecent matter in	Yes		5		
	Misprision of a felony	Yes		3		
	Mutinous, committing				3	3
	Obstructing justice	Yes		5		
	Pandering	Yes		5		
	Perjury, violation of		Yes		5	
	Perjury, statutory	Yes		5		
	Perjury, subornation of	Yes		5		
	Prisoner, allowing to do an unauthorized act				3	3
	Public record, willfully and unlawfully altering, concealing, destroying, mutilating, obliterating, removing, or taking and carrying away with intent to alter, conceal, destroy, mutilate, obliterate, remove, or steal	Yes		3		
	Quarantine, medical, breaking				5	3
	Refusing, wrongfully, to testify before a court martial, military commission, court of inquiry, board of officers, investigation under Article 32, or officer taking deposition	Yes		3		

[1] See indecent acts or liberties with a child when the offense is so charged as a result of an indecent, insulting, or obscene communication in the physical presence of a child.

Article	Offense	Punishments			
		Dishonorable discharge, forfeiture of all pay and allowances	Bad-conduct discharge, forfeiture of all pay and allowances	Confinement at hard labor not to exceed—	Forfeiture of two-thirds pay per month not to exceed—
				Years / Months	Months
134	Restriction, administrative or punitive, breaking			1	1
	Restraint or lockup:				
	Behaving in an insubordinate or disrespectful manner toward, while in the execution of his duty			3	3
	Loitering or sitting down by, while on duty			3	3
	Soliciting another to commit an offense,[1]				
	Stolen property knowingly receiving, buying, concealing:				
	Of a value of $50 or less		Yes	6	
	Of a value of $50 or less but more than $50		Yes	1	
	Of a value of more than $50	Yes		3	
	Smuggling			3	3
	Threat, communicating	Yes		3	
	Transporting, unlawfully, a vehicle or aircraft in interstate or foreign commerce	Yes		5	
	Uniform, unclean, appearing in, or not in prescribed uniform, or in uniform worn otherwise than in manner prescribed			1	1
	Unlawful entry		Yes	6	
	Weapon, concealed, carrying		Yes	1	
	Wearing unauthorized insignia, medal, decoration, or badge			6	6
	Wrongful cohabitation			4	4

[1] Unless otherwise provided in the Table, any person subject to the Code who is found guilty of soliciting or inducing another person to commit an offense which, if committed by one subject to the Code, would be punishable under this Table, shall be subject to the maximum punishment authorized for the offense solicited or induced, except that in no case shall the death penalty be imposed nor shall the period of confinement in any case, including offenses for which life imprisonment may be adjudged, exceed 5 years.